UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GREGORY YOUNG, et al., Plaintiffs, v. WELLS FARGO & COMPANY and WELLS FARGO BANK, N.A., Defendants.	Case No. 4:08-cv-00507-RP-CFB

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES TO PLAINTIFFS' COUNSEL AND SERVICE AWARDS TO CLASS REPRESENTATIVES

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I. INTRODUCTION

As discussed in detail in Plaintiffs' Motion for Final Approval of Class Action Settlement filed on December 8, 2015, Plaintiffs' Counsel obtained a favorable settlement of $25,750,000

on behalf of the Class.[1] The Settlement represents a tremendous resolution of Plaintiffs' claims, providing substantial, meaningful economic and monetary relief to the Class Members. This extraordinary result, however, was only achieved after a great deal of work and effort by Plaintiffs' Counsel, who have litigated this matter for more than seven years. (*See* Decl. Clark-Weintraub Supp. Mot. Final Approval Settlement ¶¶ 4–5, 13–43, 44–47, ("Clark-Weintraub Decl." or "Clark-Weintraub Declaration").) Plaintiffs' Counsel now hereby move for an award of attorneys' fees of 33⅓% of the Settlement Fund (which equates to $8,583,333) and for $252,877.30 in reimbursement of litigation expenses. Plaintiffs' Counsel also hereby request payments of $10,000 to each of the Class Representatives for their contribution and active participation in the Action.

As the record before this Court demonstrates,[2] this favorable outcome is the result of the hard work and diligent efforts of Plaintiffs' Counsel. The amount requested in fees and expenses for Plaintiffs' Counsel fairly and reasonably compensates them for their seven years of hard work and diligent efforts in litigating this matter as well as their unreimbursed expenses incurred. Moreover, this percentage of the Settlement Fund is in line with this Court's prior decisions regarding fees awards based upon Eighth Circuit precedent. *See, e.g.*, Findings of Fact and Conclusions of Law on Plaintiffs' Motion for Award of Attorneys' Fees and Expenses to Settlement Class Counsel at ¶ 10, *Flynn v. Sprint Commc'ns Co. L.P.*, No. 4:11-cv-00572-RP-TJS (S.D. Iowa Dec. 7, 2012), ECF No. 37 (granting 28 percent fee award and citing *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (finding "no abuse of discretion in the

[1] Capitalized terms shall have the meaning that the Stipulation ascribes to them. (*See generally* Stip. Settlement, ECF No. 243-3.)

[2] The Clark-Weintraub Declaration is an integral part of this submission. The Court is respectfully referred to it for a detailed description of the factual and procedural history of the litigation, the claims asserted, the work performed by Plaintiffs' Counsel, the settlement negotiations, and the numerous risks and uncertainties presented in this litigation.

district court's awarding of 36% to class counsel who obtain significant monetary relief on behalf of the class")).

Based on the Class Representatives' contributions to the Action and incentive awards in other cases, the service awards for the Class Representatives are also fair and reasonable. For all of the reasons given herein, the Court should grant Plaintiffs' motion for the award of attorneys' fees and ligation expenses to Plaintiffs' Counsel and service awards to the Class Representatives.

II. ARGUMENT

A. The agreed-upon attorneys' fees and litigation expenses are reasonable and warrant approval under Rules 23(h)(1) and 54(d)(2) of the Federal Rules of Civil Procedure

Plaintiffs' Counsel respectfully submit that the Fee and Expense Application is justified in light of the significant benefits the Settlement confers on the Class, the substantial risks that Plaintiffs' Counsel undertook in litigating the Action, the quality of representation, and the nature and extent of the legal services that Plaintiffs' Counsel provided. As Plaintiffs explain below, the requested fee of 33-1/3 percent of the Settlement Fund is consistent with, or less than, the percentage amounts awarded in other class action litigation of this nature. Further, the Class Representatives support an award of attorneys' fees in the requested amount. (Clark-Weintraub Decl. ¶ 10.)

Rule 23(h) of the Federal Rules of Civil Procedure provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Rule further provides that "[a] claim for an award must be made by motion under Rule 54(d)(2)," notice of which must be "directed to class members in a reasonable manner," and that the Court "must find the facts and state its legal conclusions under Rule 52(a)." Fed. R. Civ. P. 23(h)(1), (3). In turn, Rule 54(d)(2)

requires a claim for fees to be made by motion and specify the "grounds entitling the movant to the award" and "the amount sought." Fed. R. Civ. P. 54(d)(2)(B). The Claims Administrator disseminated notice of Plaintiffs' Fee and Expense Application in the class notice (including on the Postcard Notice and the long-form notice) and on the Settlement Website. (*See* Decl. Keough Regarding Notice Dissemination & Publication ¶ 13; *id.*, Ex. A,; Stip. Settlement, Ex. A-1, ECF No. 243-5.) Plaintiffs now move for approval of an award of attorneys' fees of 33-1/3 percent of the Settlement Fund, or $8,583,333, plus interest at the same rate as that earned on the Settlement Fund, as well as reimbursement of litigation expenses incurred in connection with the prosecution of the Action, plus interest, or $252,877.30—and Wells Fargo does not oppose the motion. (*See* Stip. Settlement § 7.01, ECF No. 243-3; Clark-Weintraub Decl. ¶¶ 60–86.)

Under precedent of the Eighth Circuit Court of Appeals, "[c]ourts utilize two main approaches to analyzing a request for attorney fees[,] . . . the 'lodestar' methodology . . . [and] the 'percentage of the benefit' approach[.]" *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 244–45 (8th Cir. 1996) (citations omitted). The "percentage of the benefit" approach, which is also referred to as the "percentage of the recovery" or the "percentage of the fund" method, "permits an award of fees that is equal to some fraction of the common fund that the attorneys were successful in gathering during the course of the litigation." *Id.* at 244–45, 245 n.6 (citations omitted). "It is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement[.]" *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (citing *Johnston*, 83 F.3d at 244–45).

Under the percentage of the fund method, it is appropriate to base the percentage on the full amount of the common fund, *i.e.*, the gross cash benefits available for Class Members to claim plus the additional benefits conferred on the Class by Wells Fargo's payment of attorneys'

fees and expenses and the expenses of notice and claims administration. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980) ("Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery."). This calculation applies to precisely the type of settlement presented here, where the award of attorneys' fees and expenses will be paid out of the common Settlement Fund. *See Petrovic*, 200 F.3d at 1157; *Johnston*, 83 F.3d at 246. (Stip. Settlement §§ 5.01(a)–(b), 5.01(d), 7.01, ECF No. 243-3.) The percentage method is the appropriate method of fee recovery here because, among other things, it aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum recovery in the shortest amount of time required under the circumstances, is supported by public policy, has been recognized as appropriate by the United States Supreme Court for cases of this nature, and represents the overwhelming current trend in the Eighth Circuit and most other circuits. *Cf. Johnston*, 83 F.3d at 245 (stating that a Third Circuit Task Force Report "recommended that the percentage of the benefit method be employed in common fund situations" (citing ARTHUR R. MILLER, REPORTER, COURT AWARDED ATTORNEY FEES: REPORT OF THE THIRD CIRCUIT TASK FORCE (1985) (published at 108 F.R.D. 237))); *see also id.* at 245 n.8 (listing deficiencies that the Third Circuit Task Force Report identified in the lodestar process particularly as it applies to a fund case).

A fee award of 33-1/3 percent of the value of the Settlement Fund would be well within the range of reasonable percentage fee awards in this Circuit. "The Eighth Circuit Court of Appeals has not established a 'benchmark' percentage that the court should presume to be reasonable in a common fund case." *In re Iowa Ready-Mix Concrete Antitrust Litig.*, No. C 10-

4038-MWB, 2011 WL 5547159, at *1 (N.D. Iowa Nov. 9, 2011) (citation and quotation marks omitted). "However, 'courts in this circuit . . . have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in other class actions.'" *Id.* (citations omitted); *see, e.g.*, *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 ("We have approved the percentage-of-recovery methodology to evaluate attorneys' fees in a common-fund settlement such as this, and we find no abuse of discretion in the district court's awarding 36% to class counsel who obtained significant monetary relief on behalf of the class." (internal citations omitted)); *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 2011 WL 5547159, at *2–3 (awarding 36.04% of the common fund); *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 571 (S.D. Iowa 2011) ("[T]he Court finds that under the percentage-of-the-fund method, an approximate 33% of the settlement award is fair compensation for Class Counsel.").

The fee-and-expense award is also reasonable here in light of the factors courts have considered in evaluating attorneys' fee requests. "Although the Eighth Circuit Court of Appeals 'has not formally established fee-evaluation factors, . . . it has approved consideration of the twelve factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719–20 (5th Cir.1974).'" *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 2011 WL 5547159, at *2 (citations omitted). The *Johnson* factors for evaluating attorneys' fees include:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the attorney's preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. (citation omitted). "Plainly, not all of the individual *Johnson* factors will apply in every case,

so the court has wide discretion as to which factors to apply and the relative weight to assign to each." *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 993 (D. Minn. 2005) (citations omitted).

Here, the 33-1/3 percent fee-and-expense award is reasonable under the *Johnson* factors, since in reaching the Settlement, Plaintiffs' Counsel engaged in unusually lengthy and hard-fought litigation in an area that is particularly novel and difficult.

Indeed, Plaintiffs' Counsel's work on the Action has been substantial. Prior to commencing the litigation, Plaintiffs' Counsel conducted an extensive pre-suit investigation. (Clark-Weintraub Decl. ¶ 4.) In addition, Plaintiffs' Counsel: (i) filed four complaints that reflected the pre-suit investigation; (ii) litigated a motion to transfer the Action from the United States District Court for the Northern District of California, where it was filed, to the United States District Court for the Southern District of Iowa; (iii) opposed two motions to dismiss; (iv) litigated multiple discovery motions; (v) successfully moved for class certification and opposed Wells Fargo's motion to the Eighth Circuit seeking interlocutory review of this Court's class certification decision; (vi) conducted and nearly completed fact discovery, which included the production, review, and analysis of over 50,000 pages of documents by Plaintiffs, Wells Fargo, and third parties, and more than 13.5 gigabytes of loan level data produced by Wells Fargo, as well as taking/defending a total of 12 depositions; (vii) retained and worked with multiple experts with respect to mortgage servicing industry guidelines and practices relating to property inspections and damages issues; (viii) researched the applicable law with respect to the claims of Plaintiffs and the Class, as well as Wells Fargo's potential defenses and other litigation issues; and (ix) engaged in extensive negotiation with Wells Fargo's experienced counsel for nearly six months. (*Id.* at ¶¶ 4, 67.) The requested fee is justified given the substantial work performed on a

purely contingent basis and the uncertainties and risks surrounding the litigation. (*Id.* at ¶¶ 67, 70, 73–76.)

Significantly, similar cases brought in other courts have not had the same success. *See*, *e.g.*, *Cirino v. Bank of Am., N.A.*, No. CV 13-8829 PSG MRWX, 2015 WL 3669078, at *3–5 (C.D. Cal. Feb. 10, 2015) (holding that defendant bank and its property inspection vendors did not share a common purpose and, therefore, did not constitute a valid RICO enterprise; RICO claims dismissed with prejudice); *Stitt v. Citibank, N.A.*, No. 12-CV-03892-YGR, 2015 WL 75237, at *4–7 (N.D. Cal. Jan. 6, 2015) (same); *Ellis v. J.P.Morgan Chase & Co.*, No. 12-CV-03897-YGR, 2015 WL 78190, at *4–7 (N.D. Cal. Jan. 6, 2015) (same). These facts underscore the difficulty and novelty of the Action and the extraordinary result Plaintiffs' Counsel achieved in the face of this adversity. (*See* Clark-Weintraub Decl. ¶¶ 7–8, 13–43, 55–59.)

Furthermore, the expertise and experience of counsel support the fee request here. As demonstrated by the firm résumés attached to their individual declarations, Plaintiffs' Counsel are highly experienced, skilled, and respected class action litigators that have a successful track record in class action cases throughout the country. (Clark-Weintraub Decl. Exs. 2-8.) The quality of the work performed by counsel in attaining the Settlement should also be evaluated in light of the quality of opposing counsel. Plaintiffs' Counsel was opposed in this case by two very skilled and highly respected defense firms—Severson & Werson and Faegre Baker Daniels. (Clark-Weintraub Decl. ¶ 72.) These counsel are highly skilled and experienced attorneys with vast resources. (*Id.*) In the face of this knowledgeable and formidable defense, Plaintiffs' Counsel were nonetheless able to develop a case that was sufficiently strong to persuade Wells Fargo to settle on terms that are favorable to the Class.

Finally, the contingent nature of the fee here is especially worthy of consideration when

evaluating the *Johnson* factors. As noted above, Plaintiffs' Counsel undertook the Action on a wholly contingent basis. (Clark-Weintraub Decl. ¶¶ 70, 73–76.) From the outset, Plaintiffs' Counsel understood that they were embarking on a complex and expensive litigation with no guarantee of compensation for the investment of time, money, and effort that the case would require. (*Id.* at ¶ 73.) In addition, Plaintiffs' Counsel understood that liability, damages, and class certification would be heavily contested with no assurance of success. (*Id.*)

In undertaking the responsibility for prosecuting the Action, Plaintiffs' Counsel assured that sufficient attorney resources were dedicated to the investigation of the Class claims against Wells Fargo and that sufficient funds were available to advance the expenses required to pursue and complete such complex litigation. (Clark-Weintraub Decl. ¶ 74.) As set forth below, Plaintiffs' Counsel received no compensation and, in total, incurred $252,877.30 in expenses in prosecuting this Action for the benefit of the Settlement Class. (*Id.*)

Plaintiffs' Counsel also bore the risk that no recovery would be achieved. (*Id.* at ¶ 75.) As discussed in the Clark-Weintraub Declaration, this case presented a number of risks and uncertainties which could have prevented any recovery whatsoever. Despite the vigorous and competent efforts of Plaintiffs' Counsel, success in contingent-fee litigation, such as this, is never assured. Plaintiffs' Counsel firmly believe that the commencement of a class action does not guarantee a settlement. To the contrary, it takes hard work and diligence by skilled counsel to develop the facts and theories that are needed to sustain a complaint or win at trial, or to induce sophisticated defendants to engage in serious settlement negotiations.

In sum, given the complexity and magnitude of the Action; the responsibility undertaken by Plaintiffs' Counsel; the difficulty of proof on liability and damages; the experience of Plaintiffs' Counsel and Wells Fargo's counsel; and the contingent nature of Plaintiffs' Counsel's

agreement to prosecute this Action, Plaintiffs' Counsel respectfully submit that the requested attorneys' fees are reasonable under the *Johnson* factors and should be approved.

Plaintiffs' Counsel's request for reimbursement of $252,877.30 in litigation expenses is also especially reasonable here, as detailed in the Clark-Weintraub Declaration. (Clark-Weintraub Decl. ¶¶ 80–86.) These costs were necessary to litigate this Action and achieve the excellent results of a $25,750,000 settlement. These expenses covered costs such as numerous depositions; costs associated with four separate mediations; consultants and experts.

The Court may conduct a lodestar crosscheck. *See Johnston*, 83 F.3d at 246. Here, it is apparent that a lodestar crosscheck amply supports the fee-and-expense request, based on the time and expense Plaintiffs' Counsel incurred in prosecuting this case. The total attorneys' fees and expenses that Plaintiffs' Counsel incurred in the more than seven years of litigation culminating in the Settlement, excluding local counsel fees and expenses, were just over $4,715,940.25 as of December 8, 2015. (Clark-Weintraub Decl. Exs. 2-8.) Plaintiffs' Counsel also expect to spend substantial additional time preparing for the Settlement Fairness Hearing, responding to objections, and administering the Settlement. Plaintiffs' Counsel's time is billed at their normal and usual rates for such matters, which are consistent with rates reasonable and customary to their markets.

The total fee-and-expense award requested reflects a multiplier of just 1.82 of Plaintiffs' Counsel's lodestar. In light of the favorable results obtained for the Class, the skill displayed by Plaintiffs' Counsel, their efforts in resolving the complex issues in the litigation, the considerable risk they bore in pursuing this matter, the need to spend additional time completing the process of Settlement administration, and the multipliers typically applied under similar circumstances elsewhere, the fee sought here is reasonable and fair. *See, e.g.*, *Nelson v. Wal-Mart Stores, Inc.*,

No. 2:05CV000134WRW, 2009 WL 2486888, at *2 (E.D. Ark. Aug. 12, 2009) (approving multiplier of 2.5 and citing cases within the Eighth Circuit approving lodestar multipliers of up to 5.6); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 862 (E.D. Mo. 2005) (approving a requested 2.9 multiplier and stating that "courts typically apply a multiplier of 3 to 5 to compensate counsel for the risk of contingent representation"). Moreover, as Plaintiffs' Counsel continue to administer the Settlement, the overall lodestar multiplier will continue to drop. For this additional reason, the Court should approve the fee-and-expense award of $8,583,333 to Plaintiffs' Counsel.

With respect to the timing of the distribution of any fee-and-expense award to Plaintiffs' Counsel that the Court may approve, the Stipulation requires the Claims Administrator to pay the fee-and-expense award out of the Settlement Fund[3] only after the Effective Date of the Settlement and only after the receipt by the Claims Administrator of a W-9 from each payee. (Stip. Settlement § 7.01, ECF No. 243-3.) Pursuant to the Stipulation, Plaintiffs' Co-Lead Class Counsel shall allocate any awarded attorneys' fees among all Plaintiffs' Counsel in a manner which in their good faith judgment reflects each counsel's contribution to the institution, prosecution, and resolution of this Action. (*Id.* at § 7.01.)

B. The Court should approve the proposed service awards to the Class Representatives

Plaintiffs also have moved the Court to approve service awards to the Class Representatives. Service awards are fairly typical in class action cases. *See* 4 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 11:38 (4th Ed. 2008). Indeed, "[c]ourts routinely recognize and approve incentive awards for class representatives and deponents." *Wineland v. Casey's Gen. Stores, Inc.*, 267 F.R.D. 669, 677–78 (S.D. Iowa 2009) (citations

[3] On September 30, 2015, the Settlement Amount was deposited into the Escrow Account in accordance with the terms of the Stipulation. (Clark-Weintraub Decl. ¶ 7.) The Settlement Amount is currently invested in a money market fund invested in U.S. Treasury securities. (*Id.*)

omitted). "[R]elevant factors in deciding whether [an] incentive award to [a] named plaintiff is warranted include actions [the] plaintiff took to protect [the] class's interests, [the] degree to which class has benefitted from those actions, and [the] amount of time and effort [the] plaintiff expended in pursuing litigation." *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (citation omitted); *accord In re Iowa Ready-Mix Concrete Antitrust Litig.*, 2011 WL 5547159, at *4; *Kelly*, 277 F.R.D. at 572.

Wells Fargo has agreed to pay service awards of $10,000 each to Class Representatives Edward R. Huyer, Jr., Connie Huyer, Carlos Castro, and Hazel P. Navas-Castro. (Stip. Settlement § 7.01, ECF No. 243-3.) Except as provided in the Stipulation, the Class Representatives will receive no compensation for their service as representatives of the Class. (*See id.* at §§ 2.32, 5.01(a)–(b), 7.01.)

Each of the Class Representatives has taken numerous actions to protect the Class's interests, including participating in multiple in-person and/or telephone conferences (including extensive meetings to prepare discovery responses), searching for and producing documents responsive to Wells Fargo's requests for production, and preparing for and sitting for depositions. (Clark-Weintraub Decl. ¶¶ 11, 34.) In addition, the Class Representatives reviewed and approved the Stipulation. (*Id.* at ¶ 11.) The Class Representatives' actions have benefitted the Class to a significant degree (including by culminating in the Settlement), and they demonstrate that pursuit of this litigation has required substantial time and effort of each Class Representative. The requested service awards are, respectfully, reasonable and appropriate. *See, e.g.*, *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (affirming award of $2,000 to each of five class representatives); *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 2011 WL 5547159, at *5 (approving incentive award of $10,000 to each named plaintiff); *Wineland*, 267 F.R.D. at 677–78

(same); *Zilhaver v. UnitedHealth Grp., Inc.*, 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009) (approving incentive awards of $15,000 to each named plaintiff because "[a]s named plaintiffs, they bore the risks of counterclaim or collateral attack, and consulted with class counsel throughout the suit").

III. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their Motion for Award of Attorneys' Fees and Litigation Expenses to Plaintiffs' Counsel and Service Awards to Class Representatives.

Date: December 8, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2015, the foregoing document was filed with the Clerk of the Court via the Court's CM/ECF electronic filing system and served on all counsel of record registered to receive electronic notice. Those not registered to receive electronic notice were served via regular first class mail.

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